IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-914

BARBARA BARRETT,

Petitioner,

vs.

STATE MUTUAL LIFE ASSURANCE COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Statutory and Other Provisions Involved

(1) Rule 23(f) of the Rules of this Court provides as follows:

> "(f) If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which,

and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e.g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of the court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari.

Where the portions of the record relied upon under this subparagraph are voluminous, then they shall be included in an appendix to the petition, which may, if more convenient, be separately presented."

(2) 28 U.S.C. §1257(3) provides as follows:

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * *

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

Questions Presented

1. May a writ of certiorari be sought to review a final state court decision where no federal question was raised until a motion to reargue was made in the state's highest court?

2. Does the Supreme Court have jurisdiction to review a state court's interpretation of a state statute when it is conceded that the statute is not repugnant to the Constitution, treaties or laws of the United States?

Statement of the Case

In 1969 Joseph Barrett ("Barrett") obtained a life insurance policy from State Mutual Life Assurance Company of America ("respondent") by completing a written application to respondent purporting to detail his material health history. Barrett agreed in his application that the policy applied for would not take effect unless certain conditions precedent concerning his health and consultations with doctors were satisfied. Following Barrett's death in May 1970, seven months after the issuance of the policy, respondent discovered that Barrett had not fully disclosed his health history in his application for insurance and that he had not satisfied the conditions precedent. A trial was had and the jury returned a verdict for petitioner. An appeal was taken and the Appellate Division, First Department of the Supreme Court of the State of New York vacated the judgment on the law and the facts and ordered a new trial (Pet. Br. 13a) because of the numerous errors committed by Trial Term (Pet. Br. 14a).

A second trial was had and the evidence, despite petitioner's assertions to the contrary (Pet. Br. 8), was sub-

stantially more favorable to respondent than that presented at the first trial. The Appellate Division, in its opinion on the first appeal (Pet. Br. 13a-15a), summarized certain of the pertinent evidence at the first trial including the fact that in 1964 the insured suffered from coronary insufficiency, and perhaps angina pectoris. In addition, the Appellate Division noted (1) that "testimony was elicited tending to show that in 1966 there was no further evidence of heart disease" and (2) "that it could not be stated with medical certainty that Barrett had heart trouble or heart disease in 1964". On this basis, it was established on the first appeal that issues of fact existed with regard to the existence of a misrepresentation and the materiality of any such misrepresentation (Pet. Br. 13a, 14a).

The evidence at the second trial, by way of contrast, established as a matter of law that Barrett made material misrepresentations in his application for insurance. Petitioner conceded at the second trial, for the first time, that the insured had consulted a physician, Doctor Davidoff, for a "throbbing" in his chest (R* 39) for which the doctor prescribed both peritrate and, subsequently, nitroglycerin (R 44). Thus petitioner conceded, at the second trial, that the insured suffered from chest pains which were sufficiently serious to lead him to consult Doctor Davidoff from whom he obtained prescriptions for two cardiac medicines which were not disclosed to respondent in the application for insurance.

At the first trial evidence was offered "that in 1966 there was no further evidence of heart disease" (Pet. Br. 14a) while at the second trial it was established, for the

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* References in parentheses to "R" refer to pages of the Record on Appeal filed with the New York State Court of Appeals, the relevant pages of which are annexed hereto as an appendix.

first time and so clearly that Trial Term refused to permit respondent to introduce further evidence on the issue (R 110), that in 1966 the insured was instructed by Doctor Davidoff to continue to carry nitroglycerin and peritrate with him (R 110) in order to relieve his continuing angina pectoris and coronary insufficiency (R 110).

At the first trial Dr. Davidoff testified, as noted by the Appellate Division in its opinion on the first appeal, "that it could not be stated with medical certainty that the insured had heart trouble or heart disease in 1964" (Pet. Br. 14a) while at the second trial he testified unequivocally that an exercise EKG test in 1964 showed that the insured had coronary insufficiency (R 76-77).

Doctor Davidoff also testified at the first trial that his prescription of peritrate and nitroglycerin was precautionary only (R 38a) and simply "prophylactic" (R 38a). This testimony, which was obviously misleading, was not repeated at the second trial. On the contrary, Doctor Davidoff testified at the second trial that the nitroglycerin prescription was designed to relieve immediate attacks of chest pains (R 199). He testified, with respect to the prescription for peritrate, that it was given to eliminate the insured's chest pains (R 197) and that his direction to Barrett to take the Master's two-step EKG test was an attempt to ascertain the cause of those pains. Doctor Davidoff further testified that the results of the exercise EKG were not normal (R 200) and that the results led him to take more precautions and to treat Barrett for a heart condition (R 201).

Although the evidence at the second trial unequivocally demonstrated that Barrett grossly misrepresented his material health history in his application for insurance, the jury returned a verdict for petitioner and when Trial Term refused to direct a verdict in respondent's favor an

appeal was again taken. On the second appeal the Appellate Division found that the evidence conclusively established that Barrett made misrepresentations in his application for insurance (Pet. Br. 8a), that the misrepresentations were material as a matter of law, and that respondent was entitled to a directed verdict (Pet. Br. 9a). Petitioner moved for reargument in the Appellate Division but that motion was denied. Petitioner appealed to the New York State Court of Appeals which unanimously affirmed the judgment in respondent's favor (Pet. Br. 1a, 2a) and denied petitioner's subsequent motion for reargument (Pet. Br. 2a).

POINT I

This Court Lacks Jurisdiction To Consider The Arguments Raised In Petitioner's Brief.

Rule 23(f) of the Rules of this Court (p. 1 *supra*) requires a petitioner seeking a writ of certiorari to a state court to show that the federal questions on which review is sought were properly and timely raised in the state courts in order to give this Court jurisdiction. No federal questions were raised in the two trials, in the two appeals to the Appellate Division or in petitioner's appeal to the New York Court of Appeals. It was not until petitioner moved for reargument in the Court of Appeals that she attempted to raise Constitutional issues by asking the court, in the alternative, "for leave to appeal upon constitutional grounds to the United States Supreme Court." In denying petitioner's request for alternative relief, the New York Court of Appeals made it clear that no federal questions had been raised or passed upon:

> "Motion for alternative relief, treated as one to amend the remittitur to state that a Federal question was raised and necessarily passed upon, denied." (Pet. Br. 2a).

This Court has refused to consider Constitutional questions raised for the first time on a motion to reargue in a state court. As stated in *Forbes* v. *State Council of Virginia*, 216 U.S. 396, 399 (1910):

> "It has been many times held in this court that an attempt to introduce a Federal question into the record for the first time by a petition for rehearing is too late. *Loeber* v. *Schroeder*, 149 U.S. 580, 585; *Pim* v. *St. Louis*, 165 U.S. 273.
>
> There is an exception to this rule when it appears that the court below entertained the motion for rehearing, and passed upon the Federal question. But it must appear that such Federal question was in fact passed upon in considering the motion for rehearing; if not, the general rule applies. *Mallett* v. *North Carolina*, 181 U.S. 589; *Leigh* v. *Green*, 193 U.S. 79; *Corkran Oil Co.* v. *Arnaudet*, 199 U.S. 182; *McMillen* v. *Ferrum*, 197 U.S. 343; *Waters-Pierce Oil Co.* v. *Texas*, 212 U.S. 112, 118."

Since the exception to the general rule mentioned in *Forbes* v. *State Council of Virginia*, *supra*, cannot apply in this instance, petitioner's request for a writ of certiorari should be denied.

Moreover, this Court also lacks jurisdiction to consider the matters raised in Points IV and V of petitioner's brief. In Point IV of her brief (Pet. Br. 10) petitioner argues that the appellate decisions herein violated Section 149 of the New York Insurance Law. Petitioner raised and briefed that argument before the New York Court of

Appeals which unanimously affirmed judgment in favor of respondent and subsequently denied petitioner's motion for reargument. Petitioner now seeks to have this Court consider the same argument even though, as will be demonstrated, it lacks jurisdiction to do so.

Petitioner invokes this Court's jurisdiction (Pet. Br. 2) under 28 U.S.C. Section 1257(3) which, *inter alia,* specifies that a judgment from the highest court of a state may be reviewed by writ of certiorari ". . . where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States . . .". Petitioner however, does not allege that Section 149 of the New York Insurance Law is unconstitutional. Rather, petitioner candidly admits (Pet. Br. 10) that Section 149 is "a constitutionally sound statute". Thus, this Court lacks jurisdiction to consider petitioner's arguments.

Point V of petitioner's brief (Pet. Br. 13) is based on the allegation that the New York Court of Appeals lacked jurisdiction, under the New York State Constitution, to affirm the judgment in respondent's favor because, "the Court of Appeals determined here questions of fact" (Pet. Br. 14). An alleged violation of a state constitution or a state statute, however, is not within the jurisdictional parameters of this Court under Section 1257(3) or any other statute. Furthermore, even if this Court has jurisdiction, petitioner's contention that the New York Court of Appeals determined questions of fact is incorrect because that court merely affirmed the decision of the Appellate Division which granted judgment in favor of respondent.

POINT II

There Is No Federally Guaranteed Right To Trial By Jury In A Civil Action In State Court As Asserted In Points I And II Of Petitioner's Brief.

The established rule since the decision in *Walker* v. *Sauvinet,* 92 U.S. 90 (1875), has been that the Seventh Amendment right to a trial by jury "in suits at common law" does not apply in civil actions in state court:

> "The states, so far as this amendment is concerned, are left to regulate trials in their own courts in their own way. A trial by jury in suits at common law pending in the State courts is not, therefore, a privilege or immunity of National citizenship, which the States are forbidden by the Fourteenth Amendment to abridge. A State cannot deprive a person of his property without due process of law; but this does not necessarily imply that all trials in the State courts affecting the property of persons must be by jury. This requirement of the Constitution is met if the trial is had according to the settled course of judicial proceedings." *Id.* at 92, 93.

Subsequent decisions indicate that the principle enunciated in *Walker* v. *Sauvinet, supra,* has endured the test of time. See, e.g., *Alexander* v. *Virginia,* 413 U.S. 836 (1973). In light of the foregoing authorities, petitioner's assertion that she has been deprived, in a civil state court action, of a "Constitutional right" to trial by jury is inapposite.

POINT III

Point III Of Petitioner's Brief Is Without Merit.

In Point III of her brief (Pet. Br. 9) petitioner asserts that the Appellate Division, on the second appeal, reversed itself in holding that petitioner had not made out a *prima facie* case at the first trial. Petitioner unsuccessfully made that argument to the Appellate Division twice before, once in her answering brief on the second appeal and again on her motion to reargue that appeal. In rejecting petitioner's argument, the Appellate Division correctly observed that the question of whether petitioner established a *prima facie* case was never raised or considered on the first appeal since the case was sent back for a second trial solely because of the errors committed by Trial Term. In discussing the first trial, the Appellate Division stated:

> "These errors effectively rendered the first trial a charade and a nullity and, in reversing, the question of prima facie case was never truely passed on. It is not the law of this case that plaintiff heretofore made a prima facie showing." (Pet. Br. 7a)

The Appellate Division's ruling is consistent with its order on the first appeal where it held:

> "It is unanimously ordered that the judgment so appealed from be and the same [is] hereby reversed, on the law and the facts, and vacated, and a new trial directed. . . ." (R 27a)

It is well settled under New York law that the effect of such an order is to render the first trial a complete nullity and that, upon a succeeding trial, every issue of fact or law must be litigated anew, *Halpern* v. *Amtorg Trading Corp.*, 292 N.Y. 42, 47, 53 N.E.2d 758 (1944); *Gugel* v. *Hiscox*, 216 N.Y. 145, 152, 110 N.E. 499 (1915); *Ga Nun* v. *Palmer*, 216 N.Y. 603, 612, 111 N.E. 223 (1916).

Petitioner is likewise incorrect in asserting that she has been deprived of due process and equal protection of the laws, (Pet. Br. 9). As this Court observed in *Mathews* v. *Eldridge*, 424 U.S. 319, 333 (1976):

> "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965). See *Grannis* v. *Ordean*, 234 U.S. 385, 394 (1914)."

See also *Mitchell* v. *W.T. Grant Co.*, 416 U.S. 600 (1974).

Petitioner in the instant case has been accorded more than an adequate opportunity to be heard. She has initiated two motions to reargue and two appeals, all of which were denied, with both appeals being decided unanimously in respondent's favor. Petitioner makes no claim of an inadequate opportunity to be heard; indeed, she could not reasonably raise such a claim under the circumstances of this case and her claim of denial of due process is, therefore, patently without merit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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C. ROBERT PRIANTI
ROBERT CLARY

Appendix Consisting of Relevant Pages of the Record on Appeal

Page numbers appearing in parentheses are the original page numbers used in the record on appeal.

Order of the Appellate Division, dated October 23, 1975, in Favor of Defendant and Direct a New Trial

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on October 23, 1975.

Present—Hon. Harold A. Stevens, Presiding Justice,
Francis T. Murphy, Jr.,
Vincent A. Lupiano,
Myles J. Lane,
Emilio Nunez, Justices.

Barbara Barrett,

Plaintiff-Respondent,
—against— 1153

State Mutual Life Assurance Company,

Defendant-Appellant.

An appeal having been taken to this Court by the defendant-appellant from a judgment of the Supreme Court, New York County (Kaplan, J.), entered on December 30, 1974, in favor of plaintiff against defendant in the total amount of $25,928.00, and said appeal having been argued by Mr. Charles Pratt of counsel for the appellant, and by Mr. Samuel W. Sherman of counsel for the respondent; and due deliberation having been had thereon, and upon the memorandum decision of this Court filed herein.

It is unanimously ordered that the judgment so appealed from be and the same hereby reversed, on the law and the facts, and vacated, and a new trial directed with $60 costs and disbursements to abide the event.

ENTER:

HYMAN W. GAMSO
Clerk

(27a)

Affidavit of Charles M. Pratt, dated July 16, 1976, in Support of Defendant's Motion for (1) an Order Setting Aside the Verdict and (2) a Directed Verdict in Favor of Defendant

At the first trial Dr. Davidoff testified that his prescription of Peritrate and nitroglycerin for Barrett were precautionary only. (Record 94-95*). In fact, the trial judge obtained the statement from Dr. Davidoff, at the first trial, that these prescriptions were "prophylactic" (Record 94-95). At the second trial, on the contrary, plaintiff's repeated efforts to get Dr. Davidoff to repeat this testimony were unavailing. Dr. Davidoff testified at the second trial that he had given Peritrate to Barrett to control his experience of chest pains and to prevent their recurrence. He also refused to state that the prescription of nitroglycerin for Barrett was precautionary and again stated that it was to control Barrett's symptoms of immediate pain due to angina pectoris.

At the first trial, plaintiff obtained the statement from Dr. Davidoff that he now, in hind sight, believed that Barrett had had no heart trouble. At the second trial Dr. Davidoff's revision of his medical opinion to make it more favorable to plaintiff than as it was originally reported in his records, was considerably more limited than at the first trial. Dr. Davidoff testified simply that Barrett has no

*References to the "Record" refer to the record on appeal following the first trial.

(38a)

A. Mr. Davidoff.

Q. Is it the same Dr. Davidoff sitting in the back of the courtroom today?

A. That's right.

Q. Do you know when your husband was directed to go on a diet?

A. Latter part of '64.

Q. Did your husband have any—I'll withdraw that.

Had your husband consulted Dr. Davidoff on one or more occasions in this period of 1964 when he was told to go on a diet?

A. Yes.

Q. Had your husband had any physical complaints that led him to consult Dr. Davidoff during this time, November, December 1964?

A. Yes.

Q. What physical complaints did he have?

A. Well, he had bronchitis, cold in his chest, and he had this throbbing feeling in his chest.

Q. Do you recall if your husband had a chest distress of some variety during this period November, December 1964?

The Court: Counselor, she just testified

for that particular medication?

The Witness: Yes.

The Court: You may proceed, Counselor.

Q. And this was given by Dr. Davidoff in December of 1964?

A. Yes.

Q. And did your husband carry with him these nitroglycerin pills?

Mr. Sherman: Object to this unless time is specified. This is five years before.

Q. Let me ask you—

The Court: Just one minute.

Gentlemen, do not enter into this colloquy.

The objection is overruled.

Do you know whether your husband carried this nitroglycerine with him after he received the prescription?

The Witness: I really don't recall.

Q. Do you know if your husband received a prescription for a drug called Peritrate in December of 1964?

A. Yes.

The Court: How do you spell that, Counsel?

Mr. Pratt: P-e-r-i-t—

Mr. Pratt: I now seek to give it to him for a different purpose.

The Court: Sir, do not seek it in this emphatic manner in my court. Just show him for the purposes of refreshing his recollection. That's the purpose you gave it to him in the first place.

(Document handed to the witness)

Q. When you say the Masters' two-step exercise test were positive, can you tell us what that means?

Mr. Sherman: Just a minute.

I object to counsel repeating the witness' testimony.

The Court: The objection is overruled. It's merely a preliminary question.

A. What's the question again?

The Court: Mr. Reporter, will you please repeat the question.

(The question was read back by the Court Reporter.)

A. It means that the findings upon the test which were electrocardiographic could indicate that the—could indicate that there was some insufficiency under stress.

Q. Is that coronary insufficiency?

A. Coronary insufficiency under stress.

Q. Did you receive a report, a formal report from the testing agency for this Masters' two-step test?

A. Yes, I did.

Q. Do you have that report with you today?

A. I do not.

Q. Do you have it in your possession back in your office?

A. I can't find it.

Q. Now, on November 19th did Mr. Barrett have any complaints, physical complaints?

A. No, he had no physical complaints.

Mr. Sherman: Excuse me.

What year are you talking about?

Mr. Pratt: Talking about 1964.

The Court: You may proceed, counsel.

Q. Is angina pectoris, the syndrome you mentioned earlier, a symptom of the coronary insufficiency?

Mr. Sherman: Object to this as calling for expert testimony.

The Court: The objection is sustained.

Q. Now, can you make—did you make—I believe your testimony was you made a diagnosis on November 19,

Counsel, we have gone into this at great length yesterday. Let's not start this case over from the beginning.

Mr. Pratt: Your Honor, I don't want to argue with you.

May I approach the bench?

The Court: No. Obviously he said what symptoms he had yesterday, and that based on these symptoms he told him to carry those drugs. Now the implication or inference therefrom is so obvious.

Mr. Pratt: All right. I understand, Judge.

The Court: He didn't tell him to carry these drugs with him because they were amusing to look at.

Let's proceed.

By Mr. Pratt:

Q. Did there come an occasion after January of 1966 when Mr. Barrett consulted you?

A. He was seen by me in November, about mid-November.

The Court: Of 1966?

The Witness: Of 1966—rather, 1969, it

Q. You weren't sure even on that date that he had a heart condition, were you?

A. I wasn't certain, no.

Q. Could that Peritrate do him any harm, assuming he had no heart condition?

A. It would not.

Q. It's a precautionary measure?

A. It was given with respect to an attempt to eliminate the pains which he was having, to see what effect it would have.

Q. That he was previously complaining to you about?

A. Yes.

Q. Now the next time you saw him was what date? Was that December?

A. December 5th.

Q. 1964?

A. Yes.

Q. And at that time his weight was 182?

A. His weight was down to 182.

Q. And his blood pressure was high or low, or normal?

A. It was normal.

The Court: This is cross-examination, and on cross-examination he may lead the witness. The objection is overruled.

Mr. Pratt: That is not my objection.

The Court: Your objection is overruled.

Please repeat the question.

Q. That was a precautionary measure?

A. It was.

The Court: The answer is just yes or no. Was it a precautionary measure?

The Witness: Do I have to answer it yes or no?

The Court: No.

The Witness: It was given with respect to relieve any immediate attack of pain which he might have had.

Q. Might have in the future?

A. Yes.

Q. He didn't tell he experienced violent pains?

A. He didn't tell me that he had experienced violent pains.

Q. So this was really a precaution for the future?

A. Yes; in case he had pain, he was to take medication for it to relieve the pain. It has a fast-acting effect. It may act in minutes rather than, say, prevent an attack of pain over hours.

Q. Now, Doctor, you testified that the two-step test, the report that came back to you was positive; is that right?

A. That's right.

Q. In other words, it wasn't the normal indication?

A. It was not a normal test.

Q. Now when did that test come back to you? Do you remember the date?

A. I have made a note of the report on November 19, 1964.

Q. Now, is a positive two-step test conclusive?

A. No.

Q. Is it conclusive?

A. No, sir.

Q. In other words, does it indicate positively that the man has a heart condition?

A. No, sir.

Q. Is there such a thing as a false positive:

in other words, the test may be erroneous?

A. That's right.

Q. In other words, the same person can take the same test later, and it is negative; is that right?

A. That's right.

Q. And even on the very same day, such a test can be given and it shows an opposite result?

A. I don't know—

Q. Or it may—

A. I can't say whether or not it will do it on the same day; it depends possibly on the technique as well.

Q. I see. Now when you got back your result of the test, were you certain as to whether this man had a true angina pectoris or whether he had a heart condition?

A. I couldn't be certain, but it would lean me a little to take more precautions and treat him for such a condition.

Q. Did you order electrocardiograms of this chest area on any of these tests?

A. Electrocardiograms are done during the test.